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DISCRIMINATORY HARASSMENT IN THE WORKPLACE: LEGAL STANDARDS FOR CLAIMS AND EMPLOYER LIABILITY

What is unlawful harassment in the workplace?

Contrary to popular belief, there is no law that creates a blanket prohibition on harassment in the workplace. Rather, workplace harassment is unlawful when it is discriminatory based on one's membership of a protected class, is in violation of an employer's policy, or if the harassment occurs in retaliation for engaging in some activity protected by statute, rule, or regulation.

Discriminatory Harassment

Unlawful harassment occurs most frequently when there is some discriminatory harassment by a coworker or supervisor. Harassment can occur in other contexts, such as from customers or clients. However, that is far less common. Additionally, there are a number of complicated factors that must be considered in determining whether the employer is liable for such harassment.

Establishing a claim of harassment

To establish a claim of hostile environment harassment under Title VII, the Americans with Disabilities Act, the Rehabilitation Act, or the Age Discrimination in Employment Act, a plaintiff must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability on the employer. *See Johnson v. City & Cnty. of Denver*, Civ. Act. No. 06-cv-02133-MSK-MJW, 2008 U.S. Dist. LEXIS 64561, *15-16 (D. Colo. Aug. 22, 2008) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 295 (1993); *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007)). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on *Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of employee's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

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Employer Liability for Harassment

Whether an employer will be liable for the actions of the supervisor, coworker, or other individual differs depending on a number of factors including the specific circumstances in which the harassment occurred, the impact of the harassment on the employee's job, and whether the harassment was reported. An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. *See Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action, the employer can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *See Burlington Industries, supra; Faragher, supra*; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). However, this defense is not available when the discriminatory harassment results in a tangible employment action (such as termination, suspension or demotion). In the case of coworker harassment, the employer is responsible for acts of harassment in the workplace where the employer knew or should have known of the conduct and failed to take action to stop it, unless it can show that it took immediate and appropriate corrective action.

Harassment Prohibited By Agreement, Contract, or Policy

Although there is no law prohibiting general harassment in the workplace, an employer can enact a policy or agree that harassment, bullying, or other types of inappropriate behavior will not be tolerated. Many employers' policies prohibiting harassment are designed solely to address discriminatory harassment. However, employers can, and occasionally do, enact broader policies. In such cases, it is important to carefully review the language identifying the prohibited harassment to determine if a violation occurred.

Retaliatory Harassment

Retaliatory harassment is harassment that occurs as a result of the employee engaging in some type of activity that is protected by statute, rule, or regulation. For example, Title VII of the Civil Rights Act of 1964 and the ADA both prohibit retaliation for engaging in protected activity, such as serving as a witness in a discrimination case, opposing protected activity, filing a complaint of

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discrimination, or requesting a reasonable accommodation for an individual's disability. There are similar statutory protections for whistleblowers and opposing other violations of law. Furthermore, many employers have policies that prohibit retaliation for reporting a legitimate claim to human resources or a supervisor.

Conclusion

Mistreatment in the workplace generally is not actionable in and of itself. Rather, it must violate an applicable anti-discrimination statute, violate an employer's agreement, contract, or policy, or constitute unlawful retaliation. An experienced employment law firm, like The Wick Law Office, can advise you as to whether the harassment you are experiencing is unlawful.